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### Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing

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## ROGER HAINES, JR.\*

In defense of the Relevant Conduct section of the Sentencing Guidelines, I would like to make three points: one of the charges that has been leveled against the Guidelines is that they are not individualized, and do not allow for individualized sentencing. But any fair sentencing system has to take into account more than the elements of the offense. Even in state guideline schemes that do not have a relevant conduct guideline, it is understood that in sentencing within the state range the judge will consider the individual factors of the defendant, including how much harm he caused, and what his prior record is. All these factors are laid out in the Federal Guidelines. So if you examine these state systems, you will see that in order for a sentencing system to be perceived as fair, it has to take into account some “real offense” factors.

The real complaint against the Guidelines is not that they consider “real offense” factors, but that they ordinarily prevent the judge from considering a defendant’s “specific offender characteristics,” that is, the defendant’s family background, youthfulness, drug addiction, et cetera. The reason the Guidelines generally bar these factors is that in the pre-Guideline era you had some judges who always ate hard-boiled eggs for breakfast and others who had them “over easy.”<sup>1</sup> That is, some judges thought youth was a mitigating factor, while other judges thought youth was an aggravating factor, because youthful offenders tend to recidivate most often. Likewise with addiction, some judges felt that addiction was a mitigating factor. But other judges would say addicts are more likely to recidivate, so they considered addiction an aggravating factor. The Sentencing Commission, I think very wisely, took the middle ground, deciding that judges generally cannot consider these “specific offender characteristics” at all, because these are the factors that have caused the most disparity among district judges. In short, it was proper for the Commission to include “relevant conduct” and to ordinarily exclude “specific offender characteristics,” because both of these decisions enhance the “fairness” of the guidelines.

My second point is about due process. It has been suggested that the “preponderance of the evidence” standard allows judges to sentence defendants

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1. Editor’s note *see* Professor Michael Goldsmith’s comments, 44 ST. LOUIS U. L.J. 394, 394-95 (2000) in this issue.

based on unreliable evidence. But ask any district judge, when was the last time he or she relied on evidence despite doubts about its reliability, simply because of the preponderance of the evidence standard. The judge would answer, “Never.” This is because judges try to do justice. If they have substantial doubts about relevant conduct, they simply do not include it, regardless of the “preponderance” standard. One indication of this is that there are very few reversals on appeal for unreliable evidence. So the standard of review really does not make much difference. I submit that the “tail is not wagging the dog.”

Thirdly, a question was asked whether drug quantity and fraud loss should drive the Guidelines. For drugs, I think the answer has been stated here many times; as long as there are statutory mandatory minimums, quantity will drive the drug Guidelines. The same is probably true for fraud cases, because it is difficult to find any other single factor that so captures the harm caused by fraud. With regard to “relevant conduct,” however, it is important to remember that if you are convicted of a fraud “scheme” or a drug “conspiracy,” the so-called “relevant conduct” is actually part of the offense of conviction. It is not “relevant conduct” at all. Thus, in “conspiracy” or “scheme” cases, it is not the “relevant conduct” that increases the sentence—it is the offense conduct itself. The other cases—where relevant conduct is used to increase the sentence of a defendant who is not convicted of a conspiracy or scheme—are a small part of the total number of drug and fraud cases.